Cranes, Claims and a Statutory Right of User

In larger developments there is potential for construction cranes to encroach into the airspace of neighbouring properties. To resolve issues of this nature, a statutory right of user may be sought under s 180 of the *Property Law Act 1974* (Qld). Section 180 allows the court to impose a statutory right of user on servient land where it is reasonably necessary in the interests of effective use in any reasonable manner of the dominant land. Such an order will not be made unless the court is satisfied that it is consistent with public interest, the owner of the servient land can be adequately recompensed for any loss or disadvantage which may be suffered from the imposition and the owner of the servient land has refused unreasonably to agree to accept the imposition of that obligation.

In applying the statutory provision, a key practical concern for legal advisers will be the basis for assessment of compensation. A recent decision of the Queensland Supreme Court (Douglas J) provides guidance concerning matters relevant to this assessment. The decision is *Lang Parade Pty Ltd v Peluso* [2005] QSC 112.

The Facts

The applicant had spent more than $11 million building two apartment towers on a parcel of land in Auchenflower, Brisbane. Two electric tower cranes were used on the building site. The applicant sought relief under s 180 by the imposition of a statutory right of user by way of a temporary licence permitting it to use airspace more than 25 metres above properties owned by the respondents. This would permit the continued use of the two existing cranes in the development. The evidence established that it would be difficult to further construct the development without this permission. The respondents refused permission. The principal ground for this refusal was that the respondents had not been offered as much money as they wished to receive for the grant.

The applicant had initially offered the respondents $5,000 for their permission. By the trial, the respondents had rejected further offers of compensation in amounts of $16,250, $30,000 plus costs and $35,000 plus costs respectively.

In rejecting these offers, the respondents' contention was that it was not unreasonable for them to require payment bearing some relationship to the financial gain or saving which the applicant would achieve by the use of the airspace. In this regard, the likely saving to the applicant was estimated at $219,000.

It was accepted that the existing cranes were only needed for a relatively brief period of time. It was also accepted that the cranes were not used to carry loads over the neighbouring properties, the cranes were well maintained and the

applicant maintained a policy of insurance with general liability coverage for a single occurrence of $50 million.

The Issue

Section 180(3)(b) requires the court to be satisfied that the owner of the servient land can be recompensed adequately for any loss or disadvantage which the owner may suffer from the imposition of the obligation. Section 180(4) goes on to provide that an order under the section shall include provision for payment by the applicant of such amount by way of '*compensation or consideration'* as in the circumstances appears to the court to be just.

The determination of adequate recompense was the main issue in this litigation.

For the respondents, it was submitted that the statutory reference to the words 'or consideration' mean that payment could be measured, not simply by assessing what was payable as compensation in the strict sense, but in a way that could extend beyond, for example, the diminution in the value of the land to include all factors of benefit or detriment on either side, including any increase in the profitability of the applicant's commercial venture. If this submission were accepted, the likely saving to the applicant of $219,000 would be relevant in the determination of adequate recompense.

For the applicant, it was submitted that what was required was a causal relationship between the loss or disadvantage for which compensation was claimed and the imposition of the statutory right of user. The applicant submitted that the respondents were unable to point to any disadvantage caused by the temporary imposition of the right of user for the cranes beyond the loss of a tenant who, in fact, left for reasons not associated with the presence of the cranes.

The Decision

Douglas J did not accept the respondents' submission that the saving to the applicant was an appropriate starting point to measure the recompense for loss or disadvantage or the compensation or consideration that would be just to be paid to the respondents. In rejecting this submission, Douglas J referred with approval to the rationale adopted by Windeyer J in *Goodwin v Yee Holdings Pty Ltd* (1997) 8 BPR 15,795 at 15,801 as follows:

> Clearly what is to be compensated is the loss arising from the compulsory acquisition or imposition of the easement; that is the loss of property arising from the taking out of the freehold estate the incorporeal proprietary interest of the easement. It is not compensation to be equated with or apportioned out of the gain to the dominant owner as a result of the imposition.

Rather, the correct approach was:

> to try to put oneself into the position of reasonable persons negotiating for the right of use of the air space trying their best to establish the amount of the consideration that will compensate the owner of the air space for any loss or disadvantage it may suffer by the trespass. (at [40])

Adopting this approach, and noting that the application involved a temporary effect which was insignificant in the absence of damage to the property or loss of tenants, Douglas J held that an appropriate figure was $20,000.

Comment

In this instance the respondents were clearly seeking to obtain a commercial result commensurate, in part, with the substantial savings that the applicant would undoubtedly achieve by being permitted to trespass. In rejecting this suggested construction of s 180(4), Douglas J made it clear that the adequate recompense meant for an adjoining owner 'should not be used as a means of a developer being held to ransom.' (at [33])

It is suggested, with respect, that this approach is eminently sensible. The approach is also consistent with that adopted in New South Wales. As observed by Douglas J:

> there is sense in the approach adopted in New South Wales that the statute was not designed to compensate the servient owner for the loss of the opportunity to extract money which would have been available had s 180 not been enacted. Otherwise there would have been little point in the legislation. Its primary focus is on compensation or consideration for loss or disadvantage. (at [36])

In short, as it relates to the application of s 180 of the *Property Law Act 1974* (Qld), greed is not always good.

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